91-1274

Supreme Court, U.S.
FILED
NOV 27 1991
OFFICE OF THE CLERK

No _____.
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

LILLIAN WRIGHT, Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, As Receiver of Union National Bank of Chicago, Respondent.

ON WRIT OF CERTIORI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORI

Mary Elizabeth Kopko
Attorney For Petitioner
1525 East 53rd Street
Suite 435
Chicago, IL 60615
(312) 752-2526

QUESTIONS PRESENTED

1. Whether the D'Oench doctrine and/or 12 U.S.C. §1823(e) prevent a borrower from establishing satisfaction or cancellation as a defense to a note in an action brought by the FDIC after failure of a bank.

2. Whether the D'Oench doctrine and 12 U.S.C. §1823(e), as applied by the Appellate Court, violate the due process clause of the United States Constitution.

TABLE OF CONTENTS

	Pages
Opinions Below	2
Jurisdiction	2
Statute Involved	3
Statement of Case	5
Reasons for Granting Writ	13
Appendix	29

TABLE OF AUTHORITIES

Timberland Design, Inc. v. First Serv. Bank for Sav., 932 F.2d 46 (1st Cir. 1991)	6
D'Oench, Duhme & Co. v. FDIC, 315 U.S.447 (1942)	9, 13
FDIC v. Prann, 694 F.Supp. 1027 (D.P.R. 1985)	14
Langley v. FDIC, 108 S. Ct. 396 (1987)	14, 22
FDIC v. Leach, 772 F.2d 1262 (6th Cir. 1985)	15
FDIC v. Bracero Rivera, Inc., 895 F.2d 824 (1st Cir. 1990)	15, 16
Commerce Federal Savings Bank v. FDIC, 872 F.2d 1240 (6th Cir. 1989)	15, 16

Pages

FDIC v. Merchants National Bank of Mobile, 725 F.2d 634 (11th Cir.) cert denied, 469 U.S. 829, 105 S. Ct. 114, 83 L.Ed2d 57 (1984). 16, 17

FDIC v. Kasal, 913 F.2d 487 (8th Cir. 1990)..... 15

Grubb v. FDIC, 868 F. 2d 1151 (10th Cir. 1989)..... 17

Langley v. FDIC, 108 S. Ct. 396, 401 (1987)..... 22

Matthews v. Eldridge, 96 S. Ct. 893 (1976)..... 20

Bowen v. Georgetwon Hospital, 109 S. Ct. 468 (1988)..... 24

CONSTITUTIONAL PROVISIONS

AMENDMENT V TO THE UNITED STATES CONSTITUTION 19

STATUTES

28 U.S.C. §1254(1)..... 2
12 U.S.C. §1823(e) (1989)..... 3, 11, 14
12 U.S.C. §1819..... 5
28 U.S.C. §1348..... 5
28 U.S.C. §1291..... 10
FED. R. App. P. 4(a)(1)..... 10

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992
No _____.

LILLIAN WRIGHT, Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, As Receiver of Union National Bank of Chicago, Respondent.

PETITION FOR A WRIT OF CERTIORI TO THE UNITED STATES SUPREME COURT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

LILLIAN WRIGHT, the petitioner herein, prays that a writ of certiori issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on August 29, 1991.

OPINIONS BELOW

The August 29, 1991 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reprinted in the separate Appendix to this Petition as Appendix "A". The prior opinions of the United States District Court for the Northern District of Illinois, also reprinted in the separate Appendix to this Petition as Appendix "B", and reported as follows: 684 F.Supp. 536 (N.D. Ill. 1988).

JURISDICTIONAL

The judgment of the Court of Appeals was entered August 29, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the United States Constitution -- No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or navel forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

12 U.S.C. §1823(e)(1989)

No agreement which tends to diminish or defeat the interest of the Federal Deposit Insurance Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Federal Deposit Insurance Corporation unless such agreement:

1. is in writing,
2. was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
3. was approved by the board of directors of the depository institution or its loan committee, which ap-

proval shall be reflected in the minutes of said board or committee, and

4. has been continuously, from the time of its execution, an official record of the depository institution.

STATEMENT OF THE CASE

This action was filed by the Federal Deposit Insurance Corporation ("FDIC"), in its capacity as receiver of the Union National Bank of Chicago ("Bank") against Lillian Wright, the petitioner herein, to recover amounts allegedly due under promissory notes payable to the order of the Bank. The statutory basis for jurisdiction to the district court was 12 U.S.C. §1819 and 28 U.S.C. §1348. Petitioner was a director of the Bank from 1981 - 1983.

On July 8, 1983, the Office of the Comptroller of the Currency declared the Bank insolvent and appointed the FDIC as Receiver.[1] Absolutely no evidence was submitted concerning the FDIC's normal practices and procedures in July, 1983 when it was appointed receiver nor was evidence submitted about its specific practices during its inventory of the Bank. However, the FDIC alleges that, in some way not disclosed at trial, it discovered the notes executed by Ms. Wright and demanded payment of the full.

The Notes are as follows:

---

[1] As Receiver, the FDIC manages and protects the failed bank's assets on behalf of its creditors and shareholders. In its corporate capacity the FDIC insures the depositors accounts. See, Timberland Design, Inc. v. First Serv. Bank for Sav., 932 F.2d 46 (1st Cir. 1991).

1. Commercial Promissory Note dated October 30, 1982 in the principal sum of $25,000, marked "unsecured" ("$25,000 Note").

2. Commercial Promissory Note dated October 30, 1982 in the principal sum of $75,200, also marked "unsecured" ("$75,200 Note").

3. Commercial Promissory Note dated November 12, 1982 in the sum of $27,000 ("$27,000 Note").

At trial, Ms. Wright denied any obligation under the Notes. Ms. Wright signed each of the Notes and delivered them to the Bank. On the face of each Note, it is expressly stated that the obligation "is subject to all terms" of any loan agreement. The petitioner testified that the $75,200 Note and the $25,000 Note were signed in connection with her request to secure a line of credit for her business, which line of credit was

never approved, and, consequently no funds were ever borrowed. There was no evidence submitted at trial that either the $75,200 Note or the $25,000 Note was approved by the loan committee or Board of Directors. The $75,200 Note was a consolidation and renewal of prior notes signed and delivered to the bank by petitioner. Those prior notes had been cancelled and returned to petitioner. On March 10, 1983 Petitioner received a letter from the president of the Bank, Ona Lee Kelley, stating that the Bank was cancelling the $75,200 Note and the $25,000 Note.

The letter also stated that the Bank would satisfy the $27,000 Note with funds from petitioner's escrow account, in which her accounts receivable funds were deposited. This letter identifies account numbers for each loan.

At trial, the Respondent introduced checking account statements which established petitioner's checking accounts could not have set off the balance due under the $27,000 Note. The trial court found however, that the letter from Kelley referred only to an escrow account which was never shown to have insufficient funds to satisfy the $27,000 Note.

Finally, on March 31, 1983, a letter was sent from the Comptroller of Currency Office to the bank acknowledging cancellation of petitioner's debts. Approximately three months later, on July 8, 1983, the Comptroller of Currency declared the bank insolvent and appointed the FDIC as receiver.

At trial the respondent filed a motion in limine seeking to bar petitioner's defense on the basis of the doctrine announced in D'Oench, Duhme & Co. v. FDIC, 315 U.S.447 (1942). The court denied the motion because

it was not satisfied that the FDIC had established a scheme likely to mislead Bank authorities, and indicated such scheme should be proven at trial. The court found for petitioner on each of the Notes, finding that under the D'Oench doctrine, the FDIC is obligated to prove the notes sued upon are from the Bank's open files and make some effort to show the notes were valid. The only evidence offered by the FDIC at trial to establish the validity of the Notes was testimony of the FDIC's general practices as they existed in 1988, five years after the actions taken in this case. No evidence was admitted specifically as to what happened when the FDIC became the receiver here nor at to what the FDIC's practices were in 1983.

The FDIC appealed the district court decision based upon 28 U.S.C. §1291 and Fed. R. App. P.4(a)(1).

The Court of Appeals reversed the judgment of the district court. It found that the D'Oench doctrine applies when the FDIC acts in its corporate capacity and when it acts in the capacity of receiver. Although the respondent failed to bring to the district court's attention the 1989 amendments to the Fraud Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), 12 USC §1823(e) which codifies D'Oench for FDIC in both its receiver and corporate capacities, the issue was addressed on appeal because it was raised "in substance" by respondent when it argued that petitioner could not assert an oral agreement. The Court of Appeals also concluded that FIRREA should be applied retroactively.[2]

---

[2] The 1989 amendments to FIRREA, although enacted prior to trial, were enacted subsequent to the actions upon which suit was brought. Opinion at pp. 8, 9 (7th Cir. August 29, 1991).

The Court of Appeals found D'Oench should apply even to the written letter from the Bank's president cancelling the loans because it found such letter is "relevant only when read in conjunction with the alleged oral agreement." FDIC v. Wright, 90-2217, (7th Cir. August 29, 1991) at 15. The Appellate Court did not comment on the letter dated March 31, 1983 from the Comptroller of Currency acknowledging cancellation of the notes.

The Court of Appeals also found that the district court erred in refusing to apply D'Oench without respondent proving that petitioner was involved in a scheme intended to mislead or likely to mislead banking authorities and in requiring respondent to meet the burden of proof that the notes were from the Bank's open files. The Court of Appeals not only reversed the district court's ruling on the motion in limine, but went further and

found that the district court should have the entered judgment on the Notes.

REASONS FOR GRANTING WRIT

I.

CERTIORI SHOULD BE GRANTED TO RESOLVE THE CONFLICTS IN PRINCIPLE AMONG LOWER COURTS.

The D'Oench doctrine, as set forth in D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, (1942), is a common law rule fashioned by this Court to protect the FDIC and the public from secret and unrecorded "side agreements" which are designed to deceive or tend to have that effect. Id at 460. The D'Oench doctrine prevents a borrower from asserting a private side agreement as a defense to a note. Id

Congress codified the D'Oench doctrine in enacting 12 U.S.C. §1823(e), first as applied to the FDIC in its corporate capacity (wherein it insures a failed bank's assets) and amended

prior to trial, as applied to the FDIC in its capacity as a receiver (wherein it collects on notes and obligations of a failed bank). Section 1823 specifically sets forth the type of situation to which it applies: an agreement which diminishes or defeats the interest of the FDIC in an asset. See 12 U.S.C. §1823(e). It refers to a secret agreement which concerns the note or loan, but does not refer to bank records which reflect subsequent satisfaction of a note, whether by payment or cancellation. FDIC v. Prann, 694 F.Supp. 1027 (D.P.R. 1985). The key term in determining the doctrine applicability is without question "agreement". See, Langley v. FDIC, 108 S. Ct. 396, 401 (1987).

The statute expands D'Oench in that it applies to any agreement, regardless if it is secret and the borrower participated in a scheme. However, it is narrower in that it

applies only to agreements and not to other defenses a borrower might raise. See, e.g., FDIC v. Leach, 772 F.2d 1262, 1266-67 (6th Cir. 1985). That distinction is important here in that no "scheme" was proven --thus D'Oench does not apply. Since courts have generally held that §1823(e) applies in the FDIC's corporate capacity unless the statute is made retroactive, the statute does not apply here either.

The Appellate Court here has completely failed to distinguish between satisfaction of debt by payment or cancellation which extinguishes the underlying debt and a side agreement which does not. See, FDIC v. Bracero Rivera, Inc., 895 F.2d 824, 829-30 (1st Cir. 1990); Commerce Federal Savings Bank v. FDIC, 872 F.2d 1240, 1244 (6th Cir. 1989).[3]

---

[3] In FDIC v. Kasal, 913 F.2d 487 (8th Cir. 1990). The court found that the defense of payment "based upon

The Notes here were invalidated by acts independent of any alleged side agreement: cancellation of the $75,200 and $25,000 debt and satisfaction of the $27,000 debt. Section 1823(e) (and D'Oench) simply do not apply where a note is invalidated by acts independent of any side agreement. FDIC v. Bracero Rivera, Inc., 895 F.2d 824 (1st Cir. 1990); Commerce v. FDIC Federal Savings Bank, 872 F.2d 1248 (6th Cir. 1989); FDIC v. Merchants National Bank of Mobile, 725 F.2d 634, 639 (11th Cir.) cert denied, 469 U.S. 829, 105 S. Ct. 114, 83 L.Ed2d 57 (1984). The doctrine as

---

secret unwritten side agreements never entered in the bank records" could not be considered. Id at 492. Here, the evidence of satisfaction and cancellation of the Notes was based upon a letter from the Bank's President and from the Comptroller of Currency, both documents clearly written, certainly not secret and recorded prior to the FDIC's acquiring the Bank's assets in receivership.

codified by the statute is inapplicable where the notes were voided before FDIC acquired them. Grubb v. FDIC, 868 F. 2d 1151, 1158-59 (10th Cir. 1989). The Notes here clearly were.

At no time did petitioner plead that a side agreement made the notes invalid. Rather petitioner's stipulation prior to trial clearly states that the issue contested was whether the Notes were satisfied or due and owing. The district court found that the notes were valid but subsequently satisfied. FDIC v. Wright, 85 C 3252 Memorandum Opinion, (N.D. Ill. (May 1, 1990) at 4. Petitioner submitted a letter, on the Bank's letterhead from the Bank President, dated March 10, 1983, which stated that the $75,200 Note and the $25,000 Note were cancelled and that the $27,000 Note was satisfied from funds held in her escrow account. The record also contains a letter

dated March 31, 1983, from the Office of the Comptroller of Currency to the Bank, which acknowledges cancellation of petitioner's Notes. (The Appellate Court failed to even discuss the written acknowledgement of cancellation by the Comptroller despite the fact that the acknowledgement was made prior to the date the Comptroller appointed the FDIC as receiver.) Neither letter is an "agreement" which reflects on the facial validity of any of the Notes but rather is evidence of an event subsequent to the execution of the Notes which caused satisfaction of or cancellation of the obligation. The D'Oench doctrine does not apply to evidence of satisfaction of notes or loans independent of a secret side agreement. Section 1823(e) does not apply to evidence of actions which are not an "agreement." The Appellate Court simply does not understand the difference between a release of

a debt and a side agreement inconsistent with a facially unqualified note.

II.

CERTIORI SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS RESULTS IN A VIOLATION OF DUE PROCESS.

The D'Oench doctrine (and Section 1843(e)), as applied by the Appellate Court, results in an unconstitutional violation of private citizens due process rights by a federal government agency, the FDIC. U.S. Const. Amendment V. The FDIC's actions as the receiver appointed by the Comptroller of Currency certainly constitute sufficient government action to implicate the due process clause. Any governmental conduct depriving an individual of a property right, as a matter of due process, must be implemented in a fair manner, that is, no matter how minor the

denial of life, liberty or property, no such deprivation is justified by arbitrary or unreasonable action. The risk of an error resulting from the action taken must be considered under due process. Matthews v. Eldridge, 96 S. Ct. 893, 903 (1976).

The application of the due process clause is a balancing process, requiring consideration of three factors: first, the private interest affected, second the risk of erroneous deprivation of such interest and the value of any additional or substitute safeguards and third, the government's interest, including the burden and additional safeguards would entail. Matthews v. Eldridge, 96 S. Ct. 893, 903 (1976). Here the additional safeguards which would diminish the risk of the erroneous deprivation of the borrower's private interest are reasonable: the FDIC should

be required to consider and review all of a failed bank's records, not just a few.

According to the Appellate Court here, no matter what other evidence exists in the Bank's own records which establishes that a note has been satisfied or cancelled, and that the debt is not owed, the FDIC can choose not to consider such evidence, or negligently fail to find such evidence on its own and a court must rely only on what the FDIC says, and must find the party owes the money claimed by the FDIC. There must be a meaningful opportunity afforded individuals such as the petitioner here to produce evidence contrary to that relied on by the FDIC. D'Oench was only intended to prevent fraudulent side agreements regarding facially unqualified notes. It was not intended to deprive all private citizens of any opportunity to contest, in a meaningful

way, the actions of the FDIC after a bank fails.

The Appellate Court, in applying D'Oench, relies heavily on its assumptions that the Notes are "facially unqualified." That assumption is inappropriate since the Notes are, in fact, facially qualified and expressly state that they are "subject to all terms "of any loan agreement".[4] As is customary, notes are executed by a borrower seeking a working capital line before any money is drawn off such line. Pursuant to notes, in connection with a line of credit, the borrower on the face of the note promises to pay to the order of the bank the full principal amount of the line of credit. It is only through bank

---

[4] A main purpose of 12 U.S.C §1823(e) is to allow the FDIC to rely on "seemingly unqualified notes" Langley v. FDIC, 108 S. Ct. 396, 401 (1987). That situation does not exist here.

records other than the note supporting the line of credit that a determination of the borrower's obligation, if any, can be made.

The district court accepted the evidence presented concerning the issue and found that petitioner had applied for a line of credit for both the $25,000 Note and the $75,200 Note. It then found that those lines of credit had not been approved and the Notes had been subsequently cancelled. Memorandum Opinion, N.D. Ill 85 C 3254 (May 1, 1990) at 3, 4.

Even taking the most liberal reading of the D'Oench doctrine, and making the assumption that petitioner did lend herself to an arrangement whereby bank authorities would be likely to be misled, the FDIC must make some effort to establish the accuracy of the bank

records upon which it relies.[5] The FDIC cannot be allowed to either intentionally ignore bank records which are inconsistent with bank records it would like to rely upon, or negligently fail to discover bank records which validate the bank records upon which it relies.

The D'Oench doctrine is based on the assumption that the "bank records" the FDIC relies upon are in fact the bank's records and

---

5 Prior to the 1989 Amendments, 12 U.S.C. §1983(e) applied only to the FDIC in its corporate capacity. When acting in its capacity as a receiver, as it is here, the FDIC was required to rely on the common law D'Oench doctrine. Nothing in the Amendments legislative history indicates the intent for retroactive application. FDIC v. Wright, 90-2217 (7th Cir. August 29, 1991) at 12. Since retroactivity is not favored at law, the amendments should not be applied. Bowen v. Georgetown Hospital, 109 S. Ct. 468 (1988).

that those records are accurate. No such showing was made by the FDIC at trial.

The FDIC would not be "misled" by being required to show that they are, in fact relying upon actual, authentic bank records. Ignoring bank records, such as the Bank President's letter, is not what the D'Oench doctrine permits. The doctrine was not created to allow the FDIC to carry out a fraud on the public by a bank. The doctrine cannot be intended to go so far as to stand for the principle that bank records reflecting that a note obligation has extinguished can be ignored by the FDIC and no court can be permitted to judge the effect of such additional bank records. If the FDIC can be allowed to ignore inconsistent bank records by simply relying upon D'Oench, unlimited numbers of unsuspecting members of the public are likely to be held responsible to pay again on notes

which were already cancelled or otherwise satisfied. And, according to the Court of Appeals, such unsuspecting members cannot rest comfortably after paying a note or failing to receive funds under a line of credit even if the Bank's President or Comptroller of Currency says, in writing, that the obligation no longer exists.

It is unfair and unconstitutional to allow the FDIC to decide which bank records establishes liability, when other records exist which establish no obligation. If the FDIC says an individual owes money because of the existence of a bank record, other written bank records and then testimony should be available to the trial court to assess whether a debt is actually owed.[6] A governmental

---

[6] The Appellate Court here further erred in making a finding of fact that the notes were due and owing. Upon its finding that the trial court abused its discretion in

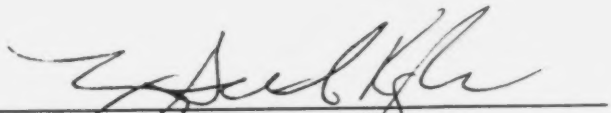
agency, such as the FDIC cannot deprive citizens of property without due process. To take the D'Oench doctrine and its statutory counterpart to the extent espoused by Judge Ripple in his opinion, is in violation of the due process clause.

---

denying Respondent's motion in limine and allowing the Petitioner to submit evidence of cancellation and satisfaction of the notes, even assuming such finding was correct, only calls for the case to be remanded to the trial court to determine the issues in dispute as finder of fact, in light of the Appellate Court's ruling.

CONCLUSION

Wherefore, Petitioner respectfully prays that a writ of certiori be granted.



Mary Elizabeth Kopko,
Attorney For Petitioner

Mary Elizabeth Kopko
Attorney For Petitioner
1525 East 53rd Street
Suite 435
Chicago, IL 60615
(312) 752-2526

In the

United States Court of Appeals

For the Seventh Circuit

No. 90-2217

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of Union National Bank of Chicago,

Plaintiff-Appellant,

v.

LILLIAN WRIGHT, also known as LILLIAN WRIGHT LAWLER,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 3252—**Brian Barnett Duff,** *Judge.*

ARGUED FEBRUARY 26, 1991—DECIDED AUGUST 29, 1991

Before FLAUM, RIPPLE, and MANION, *Circuit Judges.*

RIPPLE, *Circuit Judge.* The Federal Deposit Insurance Corporation (FDIC) in its capacity as receiver of a failed bank sued Lillian Wright, a former director of the bank, for amounts allegedly due under three facially unconditional notes signed by her. She claimed lack of consideration for two of the notes and payment in full for the other. The FDIC filed a motion *in limine* seeking to bar Ms. Wright's lack-of-consideration defense on the basis of the estoppel doctrine announced in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942). The court denied the motion and found for Ms. Wright on each of the three notes.

For the following reasons, we reverse the judgment of the district court.

I
BACKGROUND

A. *Facts*

On July 8, 1983, the Office of the Comptroller of the Currency declared the Union National Bank of Chicago (the Bank) insolvent and appointed the FDIC as receiver.[1] In that capacity, the FDIC reviewed the Bank's records in order to identify its assets and liabilities. In doing so, the FDIC discovered several unconditional promissory notes executed by Ms. Wright in favor of the Bank, which appeared to be past due. Thereafter, the FDIC brought a seven-count complaint against Ms. Wright and others. Three of the four counts against Ms. Wright are relevant to this appeal. Count II sought enforcement of a $25,000

[1] The FDIC can assume two separate roles in its relationship to a failed bank. As a receiver, the FDIC manages and protects the failed bank's assets on behalf of its creditors and shareholders. In its corporate capacity, the FDIC insures the depositor's accounts. There are two primary options available to the FDIC when a bank fails: liquidation or purchase and assumption. The liquidation option is the easiest, but carries two significant costs. A bank closing weakens depositor confidence, and the depositor often must wait a substantial time before deposits are returned. For these reasons, the preferred option is for the FDIC to purchase and assume. When it exercises this option, the FDIC in its receiver capacity sells the failed bank's assets to a healthy bank, which in turn agrees to pay the failed bank's depositors. The FDIC also sells the failed bank's bad assets to itself in its corporate capacity. With the proceeds from the sale, the FDIC pays the healthy bank the difference between what the healthy bank must pay the depositors and what the healthy bank is willing to pay for the good assets. The FDIC in its corporate capacity then seeks to obtain payment on the bad assets in order to cut the insurance fund's losses. The purchase and assumption option is frequently executed in great haste, often overnight. *See Timberland Design, Inc. v. First Serv. Bank for Sav.*, 932 F.2d 46, 48 (1st Cir. 1991).

note dated October 30, 1982; Count III sought to recover on a $75,200 note also dated October 30, 1982; and Count IV sought enforcement of a $27,000 note dated November 12, 1982.[2]

On September 10, 1986, the FDIC moved for summary judgment. In an interim ruling, the district court granted the motion on Count IV and also reserved its rulings as to Counts II, III and IV pending supplemental briefing. The court requested the parties to address whether the doctrine espoused in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), applied to the case, whether the *D'Oench* doctrine was preempted by the doctrine's partial codification in 12 U.S.C. § 1823(e), and whether the *D'Oench* doctrine applied when the FDIC acted in its capacity as receiver of an insolvent bank. *See FDIC v. Wright*, 684 F. Supp. 536, 540 (N.D. Ill. 1988). To enable the FDIC to rely on a failed bank's records, the *D'Oench* doctrine precludes a borrower who has participated in a scheme or arrangement likely to mislead banking authorities from asserting unrecorded side agreements to defeat the FDIC's interest in any assets acquired from the bank.[3] In June 1988, the FDIC responded to the district court's request for supplemental briefing. It contended that the *D'Oench* doctrine applied and prevented Ms. Wright from asserting a lack-of-consideration defense against the FDIC's claim on the notes. Moreover, the FDIC contended that *D'Oench* as a common law doctrine survived the enactment of 12 U.S.C. § 1823(e), which codified parts of the *D'Oench* doctrine, but applied only when the FDIC acted in its corporate capacity. Finally, the FDIC informed the

---

[2] Count V sought to recover on a note executed by Ms. Wright dated January 18, 1983 for $2585.82. The district court ruled in favor of the FDIC for the balance due on that note, and Ms. Wright has not appealed that ruling. Counts I and VI were directed against other defendants, and Count VII was against Ms. Wright as guarantor of a note executed by another defendant.

[3] We discuss the *D'Oench* doctrine more fully in our analysis section.

court that *D'Oench* applied to the FDIC when acting in its capacity as a receiver of an insolvent bank. Thereafter, the district court granted the FDIC's motion for summary judgment on Counts II, III, and IV. The court based its ruling on the *D'Oench* doctrine.

> With regard to the applicability of the *D'Oench, Duhme* doctrine to the lack of consideration defense, plaintiff has argued persuasively that the doctrine precludes a defendant from relying on this defense when the contract on which the FDIC brings suit is silent with respect to the bank's obligations. . . . [T]he defendant cannot assert that the bank . . . owed her a corresponding obligation, for such an unwritten obligation would clearly lend itself to an arrangement whereby the FDIC, in examining the bank's books, would be misled.

R.78.

Approximately six months after the court entered summary judgment, it granted Ms. Wright's motion to vacate the judgment. The motion was based upon newly discovered evidence. Ms. Wright alleged that she found a letter addressed to her from the Bank's president and a photocopy of the "Borrower's Copy" of the $75,200 note bearing an undated "canceled" notation. Over the FDIC's objection, the court reversed and vacated its earlier motion for summary judgment.

Thereafter the case proceeded to trial. In the parties' amended final pretrial order, Ms. Wright stipulated that she signed and delivered the notes to the Bank. Moreover, she stipulated that the notes were among the assets held by the FDIC. Prior to the bench trial, the FDIC moved *in limine* to bar Ms. Wright from asserting any oral agreement supporting her position that the $25,000 and $75,200 notes lacked consideration. The motion was based upon Ms. Wright's admissions in the pretrial order and upon the *D'Oench* doctrine. The district court denied the motion. It was not satisfied that the FDIC had established a scheme likely to mislead banking authorities and pre-

ferred the FDIC to prove the existence of any scheme at trial.

At trial, Ms. Wright denied any obligation under the notes. As the FDIC had anticipated, she claimed lack of consideration for the $25,000 and $75,200 notes and also claimed satisfaction in full of the $27,000 note. She testified that she signed the $25,000 and $75,200 notes in an attempt to secure a line of credit for her business. She further stated that she signed the notes prior to the line of credit actually being approved upon the condition and understanding that a bank officer would hold the notes until the line of credit was approved. The Bank's board of directors did not approve the extension of credit, Ms. Wright testified, and she never received the proceeds of the notes. Moreover, she contended that the $27,000 note had been paid in full from funds held in her escrow account at the Bank. To support her contentions, Ms. Wright proffered the March 10, 1983 letter from Ona Kelley, the Bank's president. The letter reads in pertinent part:

> Take Note; [a]ll your notes have been consolidated from extension to canceled [sic]. As follows; [sic]
>
> 1. Acct. 41134-0 Nov. 10, 1981 amt. $65,000.00 (a line of credit) was consolidation of group #539 of notes and account numbers 41188-0 Dec. 14, 1981 of 10,000.00.
> 2. Account # 40390-0 Dec[.] 23, 1980 of 30,000.00.
> 3[.] Account number 413919 July 1, 1982 of 25,000.00.
>
> Your current note that was rewritten from the notes above are one in the same[.] In other words[,] the above notes and the 75,200.00 are the same. I hope at this you are not confuse[d], now your note Account number 416510 of 27,000.00 is the only note we will not cancel.
>
> The reason we will not cancel your note account 416510 of 27,000.00 [is] because we are holding in Escrow 45,000.00 (forty[-]five thousand dollars) in accounts receiable [sic] that belong to you in the name of your company[ ] (Community Beauty & Barber Supply)[.]

> Since this [is] the only note that was executed properly[,] we will put it through[ ] because your accounts receiable [sic] more than justify the amount due[.] We will pay off the 27,000.00 (Twenty[-]seven thousand dollars) and deposit the balance in your Savings account as instructed by you.

Appellant's App. Ex. G.

B. *District Court Opinion*

The court found that, while the notes were facially unconditional promises to pay, "there is no evidence that either the $75,200 note or the $25,000 note were ever approved by the loan committee or the Board of Directors as loans. No money was ever paid to Ms. Wright or credited to her account on the basis of those two notes." Mem. Op. at 3. The court further found that the March 10, 1983 letter was credible and that it canceled the $25,000 and $75,200 notes and evidenced payment of the $27,000 note. *See id.* at 4. The FDIC had submitted Ms. Wright's *checking* account statements to establish that she had insufficient funds to set off the balance due under the $27,000 note. The court observed, however, that the March 10 letter referred to an *escrow* account and "the FDIC has not proven that the note could not have been satisfied with the escrow funds." *Id.* at 5.

Turning to the applicable governing law, the court explained the doctrine announced in *D'Oench* and noted that 12 U.S.C. § 1823(e) partially codified the doctrine as it related to the FDIC in its *corporate* capacity. It then determined that section 1823(e) did not preempt the common law by precluding the application of the *D'Oench* doctrine when the FDIC acted in its *receiver* capacity. *See* Mem. Op. at 6-8. Notwithstanding the doctrine's applicability, the court determined that the FDIC could not employ *D'Oench* in this case because it failed to satisfy a threshold requirement. "Even under *D'Oench*, the FDIC is obligated to prove that it acquired the notes from the bank's open files; that is, that at the time the FDIC took over,

the bank carried the note as an asset. This the FDIC has not done." *Id.* at 9. The court remarked that the FDIC offered no testimony or evidence from anyone who inventoried the Bank's assets after it went into receivership. The court stated that the FDIC could not assert the significant power of the *D'Oench* doctrine unless the FDIC could establish that "it shouldered its responsibility to make *some* effort to ascertain whether the notes were valid. This the FDIC has not done, and therefore it is not entitled to the substantial advantage conferred by the *D'Oench* doctrine." *Id.* at 10 (emphasis in original).

Moreover, the FDIC failed to prove, under the preponderance of the evidence standard, that the $25,000 and $75,200 notes were in fact valid and, the court concluded, also had failed to carry its burden of proving that funds from the escrow account could not have satisfied the $27,000 note as the March 10 letter indicated. *See id.* at 10-11. Accordingly, the court found in favor of Ms. Wright on Counts II, III, and IV. The FDIC filed a timely notice of appeal.

II
ANALYSIS

A. *Guiding Principles*

1. The *D'Oench* doctrine

We begin with a brief review of the origin and purposes of the *D'Oench* doctrine. In *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), the defendant and his bank contrived a scheme to deceive state regulators by falsely inflating the value of the bank's assets. The defendant executed a note in favor of his bank, but the bank never dispensed any proceeds in exchange for the note. However, as part of the plan, the parties also agreed that the note would never be called due. Because of the fraudulent nature of the scheme, this agreement was not reflected in the bank's records. Eventually, the bank was unable to continue to conceal its weak financial condition, and

the FDIC took over. When the FDIC sued the defendant for payment on the note, he claimed lack of consideration and offered his agreement with the bank as a defense. The Supreme Court reviewed the statutory provisions creating the FDIC and concluded that they revealed a federal policy of protecting the FDIC and the public funds it insures and administers against misrepresentations of a bank's assets. To effectuate this policy, the Court fashioned a common law rule of estoppel preventing a borrower from asserting a defense against the FDIC on the basis of secret or unrecorded "side agreements." The Court stated:

> The test is whether the note was designed to deceive the creditors or the public authority, or would tend to have that effect. It would be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the banking authority on which respondent relied in insuring the bank was or was likely to be misled.

Id. at 460. The Supreme Court further determined that the rule of estoppel should be applied even when the borrower was " 'very ignorant and ill-informed of the character of the transaction,' " and " 'may not have intended to deceive any person,' " and even if "creditors may not have been deceived or specifically injured." *Id.* at 458-59 (citations omitted). *D'Oench* itself involved the FDIC in its corporate capacity; however, courts have consistently applied the estoppel doctrine in cases where the FDIC acts, as it does here, in its capacity as a receiver. *See Timberland Design, Inc. v. First Serv. Bank for Sav.*, 932 F.2d 46, 49 (1st Cir. 1991) (citing cases).

2. 12 U.S.C. § 1823(e)

Congress codified the *D'Oench* doctrine by enacting 12 U.S.C. § 1823(e), which, as the district court noted, originally applied to the FDIC only in its corporate capacity. However, the district court failed to recognize that, over four months prior to trial, section 1823(e) was amended

by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, § 217(4), 103 Stat. 183, 256, making section 1823(e) directly applicable to the FDIC in its receiver capacity.[4] Thus, section 1823(e) in its present form reads:

> No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or *as receiver of any insured depository institution*, shall be valid against the [FDIC] unless such agreement—
>
> (1) is in writing,
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (4) has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C.A. § 1823(e) (West 1989) (emphasis supplied).[5]

---

[4] FIRREA was enacted August 9, 1989, and the two-day bench trial began December 13, 1989.

[5] The Supreme Court articulated the objectives of section 1823(e) (and thus implicitly the *D'Oench* doctrine) in *Langley v. FDIC*, 484 U.S. 86 (1987). Writing for a unanimous Court, Justice Scalia stated:

> One purpose of § 1823(e) is to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets. Such evaluations are necessary when a bank is examined for fiscal soundness by state or federal authorities, and when the FDIC is deciding whether to liquidate

(Footnote continued on following page)

In its motion *in limine*, the FDIC did not advise the court of this amendment to section 1823(e). The FDIC could have argued that section 1823(e) barred Ms. Wright's defense of lack of consideration because with the enactment of FIRREA—nearly four months before the FDIC filed its motion—section 1823(e) became applicable to cases involving the FDIC in its receiver capacity. Notwithstanding this opportunity, the FDIC proffered the *D'Oench* doctrine as the sole basis for its motion. The FDIC continued this course at trial. Counsel for the FDIC represented to the district court that section 1823(e) "refers to the corporation and it has been held that 1823(e) does not apply to a receiver, only in its corporate capacity to the FDIC." Tr. of Dec. 13, 1989 at 7. On appeal, for the first time, the FDIC presses section 1823(e) as a shield to Ms. Wright's lack-of-consideration defense.

The FDIC's actions in this case are not the level of representation federal courts deserve and expect from a government agency. We must now determine whether its dilatory actions prevent our considering section 1823(e) on appeal. Generally, arguments not raised in the district

---

[5] *continued*

a failed bank, or to provide financing for purchase of its assets (and assumption of its liabilities) by another bank. The last kind of evaluation, in particular, must be made "with great speed, usually overnight, in order to preserve the going concern value of the failed bank and avoid an interruption in banking services." Neither the FDIC nor state banking authorities would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions.

A second purpose of § 1823(e) is . . . [to] ensure mature consideration of unusual loan transactions by senior bank officials, and prevent fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure.

Id. at 91-92 (citations omitted); *accord FDIC v. State Bank of Virden*, 893 F.2d 139, 143 (7th Cir. 1990); *FDIC v. O'Neil*, 809 F.2d 350, 353 (7th Cir. 1987).

court are waived on appeal. *See, e.g., Manor Healthcare Corp. v. Guzzo*, 894 F.2d 919, 922 (7th Cir. 1990). Nevertheless, we conclude that the FDIC has not waived its right to assert section 1823(e). First, in substance, the argument actually was raised by the FDIC in the district court. At each stage of the proceeding, the FDIC argued that Ms. Wright could not assert an oral agreement that tended to diminish the FDIC's interest in an asset acquired from a failed bank. The FDIC simply misstated the law. Furthermore, it is unclear whether Congress intended the protections afforded the FDIC under section 1823(e) to be waived by failure to assert specifically the right to those protections. The banking crisis attending the passage of FIRREA suggests that Congress intended the requirements of section 1823(e) to be strictly followed in order to maintain the integrity of the FDIC as an insurer of federally insured deposits. Accordingly, we believe we may apply the present version of section 1823(e) unless we determine that it may not be applied retroactively. We now turn to that question.

3. Retroactivity of FIRREA

Relying on *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), Ms. Wright argues that section 1823(e) as amended should not apply to the FDIC in its capacity as a receiver because a "manifest injustice" would result. *Bradley* provides the appropriate framework for determining when to apply recently enacted statutes to cases pending before their enactment. There, the Supreme Court instructed courts "to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Id.* at 711; *see National Labor Relations Bd. v. Bufco Corp.*, 899 F.2d 608, 611-12 (7th Cir. 1990). Hence, section 1823(e) as amended governs this case unless either of the two *Bradley* exceptions are satisfied.

We turn first to FIRREA and its legislative history for any indication that Congress intended FIRREA to apply

only prospectively. *Bradley* established a presumption of retroactivity for legislative enactments, which may be displaced by " 'a fair indication that the statute, properly construed, has only prospective effect.' " *Campbell v. United States*, 809 F.2d 563, 572 (9th Cir. 1987) (quoting *Litton Sys. v. American Tel. & Tel. Co.*, 746 F.2d 168, 174 (2d Cir. 1984)); *accord Brooks v. United States*, 757 F.2d 734, 742 (5th Cir. 1985). However, when the legislative history could support either view, the statute should be applied retroactively. *See Bradley*, 416 U.S. at 715-16; *Campbell*, 809 F.2d at 572.[6] The FDIC points out that neither the committee reports nor the floor debates on FIRREA indicate that newly amended section 1823(e) should be applied only prospectively. Likewise, our research reveals no such indication.[7] However, we can glean insight into the purpose of amended section 1823(e) from the House Committee on Banking, Finance and Urban Affairs Report on FIRREA. According to that report, sec-

---

[6] The Supreme Court itself recently has noted that a tension exists between the presumption of retroactivity emphasized in cases such as *Bradley* and a presumption of nonretroactivity emphasized by cases such as *Bowen v. Georgetown University Hospital*, 109 S. Ct. 468, 471 (1988) ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."). *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 110 S. Ct. 1570, 1576-77 (1990). The Court in *Kaiser* declined to resolve that tension.

Despite the existence of an alternative line of precedent, we believe there is no prejudice in applying only *Bradley* and its progeny to the facts in this case. Any tension between the two lines of precedent is negated because, under *Bradley*, a statute will not be deemed to apply retroactively if it would threaten manifest injustice by disrupting vested rights. *See* 416 U.S. at 720-21.

[7] *See FDIC v. Dalba*, No. 89-C-712-S, 1990 WL 43750 at *3 (W.D. Wis. Feb. 27, 1990) ("Neither of the parties has presented the Court with any legislative history indicating a Congressional intent to apply the statute retroactively or prospectively. Neither has this Court's independent review of the legislative history of the [FIRREA] revealed such intent.").

tion 212, which expanded the conservatorship and receivership powers of the FDIC, was "designed to give the FDIC power to take all actions necessary to resolve the problems posed by a financial institution in default." H.R. Rep. No. 54(I), 101st Cong., 1st Sess. 330, *reprinted in* 1989 U.S. Code Cong. & Admin. News 126. Accordingly, a reasonable interpretation of the receivership provisions contained in FIRREA (including section 217, which amended 12 U.S.C. § 1823(e)) is that Congress included those provisions to aid the FDIC in its immediate responsibilities of dealing with mounting bank failures in this country. A retroactive application of FIRREA would further that congressional intent.

As for *Bradley*'s second exception, we perceive no threat of manifest injustice in the present case. Ms. Wright asserts that manifest injustice would result if section 1823(e) were applied retroactively to cases involving the FDIC in its receiver capacity because the FDIC failed to provide evidence that the notes were actually assets carried by the bank and because it further failed to demonstrate that it distinguished between closed and open files. Ms. Wright's arguments focus on irrelevant considerations. As we noted in *In re Busick*, 831 F.2d 745, 748 (7th Cir. 1987), the Supreme Court in *Bradley* enumerated three factors that courts should consider in determining whether a manifest injustice will result from applying a legislative enactment to cases pending prior to the enactment of that legislation. "These factors included: 1) the nature and identity of the parties; 2) the nature of the rights affected; and 3) the impact of the change in law on pre-existing rights." *Id.* (citing 416 U.S. at 717).

The first factor weighs against a finding of manifest injustice. This is not simply a private case between individuals. It involves a federal agency appointed as a receiver of a failed bank in the midst of a national banking crisis. The *Bradley* Court's reliance on Chief Justice Marshall's comment is instructive on this point: " 'It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will,

by a retrospective operation, affect the rights of the parties, but in great national concerns . . . the court *must* decide according to existing laws . . . .' " 416 U.S. at 712 (quoting *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801)) (emphasis supplied); *see id.* at 719. As our colleagues on the Eighth Circuit have noted, "[n]ational concerns and public parties encourage retroactive application of the legislation at issue." *Seniors United for Action v. Ray*, 675 F.2d 186, 189 (8th Cir. 1982). In the present case, a federal agency is involved, and the circumstances leading to the enactment of FIRREA involved matters of great national concern.[8]

The second factor supports a determination of manifest injustice when retroactive application of the statute "would infringe upon or deprive a person of a right that had matured or become unconditional." *Bradley*, 416 U.S. at 720. Similarly, the third factor focuses on "the possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard." *Id.* Neither of these concerns are present here. Section 1823(e) as amended simply codified the existing common law *D'Oench* doctrine by giving it "statutory backing." *FDIC v. State Bank of Virden*, 893 F.2d 139, 143 (7th Cir. 1990) "[C]ourts have found the aims of section 1823(e) and *D'Oench* identical and thus have construed defenses premised upon section 1823(e) and *D'Oench* in tandem." *Twin Constr., Inc. v. Boca Raton, Inc.*, 925 F.2d 278, 382 (11th Cir. 1991). *But cf. FDIC v. O'Neil*, 809 F.2d 350, 353 (7th Cir. 1987) ("The statute makes the common law principle both more encompassing and more precise."). Consequently, Ms. Wright could have harbored no reasonable expectation that the *D'Oench* doctrine would not ap-

---

[8] *See, e.g.*, H.R. Rep. No. 54(I), 101st Cong., 1st Sess. 304-05, *reprinted in* 1989 U.S. Code Cong. & Admin. News 100-01 (quoting Treasury Secretary Nicholas Brady's comment about "the savings and loan crisis" and President Bush's remark that it was a "national problem").

ply to her case based on the fact that FDIC was acting in its receiver capacity.

Ms. Wright originally proffered an *oral* agreement as a defense to the FDIC's claim for the $25,000 and $75,200 notes signed by her. *D'Oench* clearly applied to that situation, and applying section 1823(e) to that same situation results in no manifest injustice. Moreover, we find no manifest injustice in applying section 1823(e) to the *written* letter that Ms. Wright alleges confirmed the oral understanding. Even under Ms. Wright's theory of the case, the writing is relevant only when read in conjunction with the alleged oral agreement. While *D'Oench* applies to cases when "the maker's defense depend[s] solely upon a secret or unrecorded agreement, *usually oral*, of which the FDIC could have had no notice," *Howell v. Continental Credit Corp.*, 655 F.2d 743, 747 (7th Cir. 1981) (emphasis supplied), authority exists for the application of *D'Oench* when the agreement is written and does not manifest facially bilateral obligations found in the records of the bank. *See, e.g., Savers Fed. Sav. & Loan v. Amberley Huntsville, Ltd.*, 934 F.2d 1201, 1206 (11th Cir. 1991) (party may not assert collateral written agreement by bank not to collect note under *D'Oench*); *Twin Constr., Inc. v. Boca Raton, Inc.*, 925 F.2d 378, 383 (11th Cir. 1991) (applying *D'Oench* and retroactively applying 1823(e) to written agreement in case involving FDIC as receiver).[9] Moreover, even before the amendment of section 1823(e), Ms. Wright would have been subject to its strictures if the FDIC had sued her in its corporate capacity. Therefore, in ordering her financial affairs, she could not have relied reasonably on a restrictive interpretation of the common law *D'Oench* doctrine. In sum, we conclude that retroactively applying the receiver provision of section

[9] Courts have recognized that, when a writing manifesting bilateral obligations *appears in the bank's records*, *D'Oench* does not aid banking authorities. *See Twin Constr. Inc. v. Boca Raton, Inc.*, 925 F.2d 378, 383 (11th Cir. 1991) (citing *FSLIC v. Two Rivers Assocs.*, 880 F.2d 1267, 1275 (11th Cir. 1991)).

1823(e) would not infringe upon any matured right held by Ms. Wright or impose any new obligation upon her without notice. Amended section 1823(e) applies in the present case.[10]

B. *Application of the Principles to This Case*

1. The $25,000 and $75,200 notes

The FDIC challenges the district court's denial of its motion *in limine* based on *D'Oench*. As we noted, the motion sought to bar Ms. Wright's defense that the facially unqualified notes lacked consideration. In general, we will not disturb a court's denial of a motion *in limine* absent an abuse of discretion. *See United States v. Studley*, 892 F.2d 518, 534 (7th Cir. 1989); *Pearl v. Keystone Consol. Indus., Inc.*, 884 F.2d 1047, 1052 (7th Cir. 1989). In this case, however, the court based its ruling on an application of the *D'Oench* doctrine, a question of law, which we review *de novo*. *See Rheinstrom v. Commissioner*, 925 F.2d 1066, 1068 (7th Cir. 1991). Accordingly, we may find an abuse of discretion if we conclude, by independent review, that the court misapplied *D'Oench*. *Cf. Somerset House, Inc. v. Turnock*, 900 F.2d 1012, 1014 (7th Cir. 1990) (standard of review varies with assorted functions performed by district court).

That is precisely what the FDIC contends. The misapplication of *D'Oench* is manifest, the FDIC argues, in the court's ruling that the FDIC failed to establish a scheme likely to mislead banking authorities as required by *D'Oench*. The FDIC maintains that it met this requirement by proffering the unqualified promissory notes and

---

[10] Our conclusion is in accordance with other courts that have addressed the issue of the retroactivity of FIRREA. *See, e.g., Twin Constr., Inc. v. Boca Raton, Inc.*, 925 F.2d 378, 381-82 (11th Cir. 1991); *Resolution Trust Corp. v. Dismuke*, 746 F. Supp. 104 (N.D. Ga. 1990); *FDIC v. Sullivan*, 744 F. Supp. 239 (D. Colo. 1990); *FDIC v. Dalba*, No. 89-C-712-S, 1990 WL 43750 at *4 (W.D. Wis. Feb. 27, 1990).

Ms. Wright's stipulation that she executed and delivered them. Furthermore, relying on our decision in *FDIC v. Venture Contractors, Inc.*, 825 F.2d 143 (7th Cir. 1987), the FDIC maintains that the court imposed on it an improper and unreasonable burden by requiring it to prove the validity of the notes through evidence of their location at the time the inventory was conducted at the Bank's closing. In a most cursory fashion, Ms. Wright argues that the district court correctly applied *D'Oench* and essentially adopts its analysis.

a. establishing a scheme likely to mislead banking authorities

In denying the FDIC's motion *in limine*, the district court misapprehended the requirement of proving a scheme or agreement likely to mislead banking authorities under *D'Oench*. The Supreme Court has held that the signing of a facially unqualified note subject to an unrecorded condition is itself likely to mislead banking authorities.

> Certainly, one who signs a facially unqualified note subject to an unwritten and unrecorded condition upon its repayment has lent himself to a scheme or arrangement that is likely to mislead the banking authorities, whether the condition consists of performance of a counterpromise (as in *D'Oench, Duhme*) or of the truthfulness of a warranted fact.

Langley v. FDIC, 484 U.S. 86, 93 (1987).[11] In this case, Ms. Wright signed facially unqualified notes for $25,000 and $75,200, but asserted a side agreement with the bank that they would not be payable if the board of directors

[11] While *Langley* involved the application of 12 U.S.C. § 1823(e), courts "often consider the *D'Oench, Duhme* doctrine and § 1823(e) in tandem." *Beighley v. FDIC*, 868 F.2d 776, 784 (5th Cir. 1989); *see, e.g., Langley*, 484 U.S. at 92-93; *Twin Constr., Inc. v. Boca Raton, Inc.*, 925 F.2d 378, 382 (11th Cir. 1991); *FDIC v. McClanahan*, 795 F.2d 512, 516 (5th Cir. 1986).

failed to approve them. Therefore, she participated in a scheme that was likely to mislead banking officials. Ms. Wright's position is similar to that of the defendant in *FDIC v. McClanahan*, 795 F.2d 512 (5th Cir. 1986). Hoping to obtain equipment financing, the defendant signed and delivered to a bank a blank promissory note with the understanding that it would be filled in later to reflect the terms of the loan. The loan was never approved, and the defendant sought financing elsewhere. He did not, however, request the return of the note. Unbeknownst to the defendant, an officer at the bank filled in the terms of the note and pocketed the proceeds. Subsequently, the bank failed, and the FDIC sought payment on the note that bore the defendant's signature. The defendant, like Ms. Wright, raised the defense of failure of consideration. *See id.* at 514. The district court had ruled that *D'Oench* was inapplicable because the defendant did not make a "secret agreement" with the bank. Characterizing the defendant's conduct as "reckless," the Fifth Circuit reversed and held that the defendant had " 'lent himself to a scheme or arrangement whereby the [appropriate] banking authority . . . was or was likely to be misled.' " *Id.* at 516-17 (quoting *D'Oench*, 315 U.S. at 460).

Likewise, in *FDIC v. Caporale*, 931 F.2d 1 (1st Cir. 1991), the defendants admitted that they had signed facially unconditional notes, but contended that the bank filled in the amounts without their authorization. The court concluded that the *D'Oench* doctrine precluded them from asserting that defense against the FDIC. "By signing blank notes, the [defendants] 'lent themselves' to a scheme that could mislead bank examiners. 'An unscrupulous bank officer could overstate the amount of the note and thus overstate the bank's assets.' " *Id.* at 2. The court further noted that "under *D'Oench*, [the defendants] may not rely on a condition that was not reflected in the bank's official records, even if their reliance was in good faith and there was no intent to defraud." *Id.* Thus, the *D'Oench* doctrine is applicable even though Ms. Wright may not have intended to defraud. "[T]he *D'Oench* doctrine applies where

the only element of fault on the part of the borrower was his or her failure to reduce the agreement to writing."[12] *Timberland Design, Inc. v. First Serv. Bank for Sav.*, 932 F.2d 46, 49 (1st Cir. 1991). Accordingly, the estoppel doctrine articulated in *D'Oench* prevents Ms. Wright from asserting, as a defense against the FDIC, the agreement with the Bank that the $25,000 and $75,200 notes would not be payable unless the board of directors approved them.[13] Furthermore, section 1823(e) likewise prohibits

---

[12] The *Caporale* court explained the reason for the apparently harsh application of the *D'Oench* doctrine: "As among borrowers, thrift regulators, depositors, and creditors, the borrower is in the best position to protect himself and must therefore suffer the risk of loss if he fails to ensure that his agreement is properly recorded." 931 F.2d at 2; *see FDIC v. State Bank of Virden*, 893 F.2d 139, 144 (7th Cir. 1990). On this topic, the Fifth Circuit's colorful comments are insightful:

> The lack of a malfeasance requirement makes *D'Oench, Duhme* a sharp sword and sturdy shield indeed. What is the purpose of such imposing armaments? Fundamentally, *D'Oench* attempts to ensure that FDIC examiners can accurately assess the condition of a bank based on its books. The doctrine means that the government has no duty to compile oral histories of the bank's customers and loan officers. Nor must the FDIC retain linguists and cryptologists to tease out the meaning of facially-unencumbered notes. Spreadsheet experts need not be joined by historians, soothsayers, and spiritualists in a Lewis Carroll-like search for a bank's unrecorded liabilities. Perhaps mindful of the fate that befell the Baker, whose search for the Snark ended with his own disappearance, *D'Oench, Duhme* seeks to ensure that a bank's assets do not "softly and suddenly vanish away."

Bowen v. FDIC, 915 F.2d 1013, 1016 (5th Cir. 1990) (citation omitted).

[13] Other courts have found that *D'Oench* bars a defendant from asserting a lack-of-consideration-type defense in an action by the FDIC or the FSLIC upon a facially unconditional note. *See, e.g., FDIC v. McCullough*, 911 F.2d 593, 601 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2235 (1991); *FSLIC v. Wilson*, 722 F. Supp. 306, 312-13 (N.D. Tex. 1989); *FDIC v. Sarvis*, 697 F. Supp. 1161, 1164 (D. Colo. 1988).

Ms. Wright from asserting her side agreement with the bank as a defense. "A condition to payment of a note . . . is part of the 'agreement' to which the writing, approval, and filing requirements of 12 U.S.C. § 1823(e) attach." *Langley*, 484 U.S. at 96. Ms. Wright has offered nothing to demonstrate that any of the four requirements under section 1823(e) were met when she made the agreement with the bank. We conclude that the district court abused its discretion in denying the FDIC's motion *in limine*.

b. FDIC's burden of establishing an asset's validity

We also agree with the FDIC that the district court denied it the operation of the *D'Oench* doctrine by imposing an improper burden on it. Citing no authority, the district court required the FDIC to prove that the notes were from the Bank's open files, or in other words were in fact assets carried by the Bank, before the FDIC could invoke the *D'Oench* doctrine. In *FDIC v. Venture Contractor, Inc.*, 825 F.2d 143 (7th Cir. 1987), the defendant was a guarantor of a note acquired by the FDIC as receiver of a failed bank. The defendant contended that his guaranty was not an asset of the bank and that the FDIC must have obtained it from a closed file. The issue at trial therefore was "whether the guaranty instrument had previously been placed in the bank's active or inactive files." *Id.* at 145. The FDIC offered no evidence as to the location of the guaranty at the time of the bank's closing (in fact it stipulated that it did not maintain such records). Instead, the FDIC rested solely on an assertion of general practice. It offered the deposition of an FDIC employee who testified that it was never the practice of the FDIC nor was it during the closing of the bank to take written instruments from closed or inactive files once a bank had been closed. *See id.* at 145. The district court accepted this evidence and found:

> "It is unlikely that the FDIC would go rummaging through closed or inactive files, and the parties agree . . . that it was not the FDIC's practice generally

> or at [the bank] to remove written instruments from files which were closed or inactive files . . . . The FDIC rested solely upon an assertion of a general practice; defendant rested upon inferences arising from his assertion that the guaranty was in fact dead.
>
> . . . .
>
> [E]ven if we assume that the FDIC has the burden of showing the location of the guaranty, by far the more reasonable inference is that it was among the active files of the bank, and this court so finds."

Id. at 146. We relied on the above analysis in affirming the district court's finding that the guaranty was a valid asset. *See id.* at 146-47.

Without deciding whether the FDIC in fact must shoulder the burden of proving the validity of an asset it acquires, *Venture* teaches that the FDIC can raise a reasonable inference of an asset's validity by resting "solely upon an assertion" that as a "general practice" it does not remove written instruments from closed or inactive files once the bank has been closed. *Id.* at 145. In this case, a FDIC bank liquidation specialist testified as to the general practices employed by the FDIC in inventorying the assets of a failed bank. The record suggests nothing to indicate that this general practice was not followed by the FDIC in this case. We also believe that, as was the case in *Venture*, it is unlikely that the FDIC went rummaging through the Bank's closed or inactive files to find the notes executed by Ms. Wright.[14] Ms. Wright's own stipulations support this conclusion. She specifically stipulated that she signed and delivered the notes and that all three notes

---

[14] *See also FDIC v. Cover*, 714 F. Supp. 455, 457-58 (D. Kan. 1988) (FDIC's bank liquidation specialist's testimony that notes at issue were reflected as assets in failed bank's files established the validity of the notes); *FDIC v. Powers*, 576 F. Supp. 1167, 1169 (N.D. Ill. 1983) (rejecting as frivolous defendants' contention that their facially unconditional written guarantees were not "assets" under section 1823(e)).

at issue were among the *assets* held by the FDIC. Accordingly, we reasonably may infer that the notes were valid assets without evidence as to their location at the time of the Bank's closing.

In conclusion, the district court misapplied the *D'Oench* doctrine and section 1823(e). *D'Oench* and section 1823(e) barred Ms. Wright from asserting her side agreement with the bank as a defense to the FDIC's claim against her on the $25,000 and $75,200 notes. It is apparent from the record that the side agreement was Ms. Wright's only defense as to these notes. Therefore, in addition to granting the motion *in limine*, the court should have entered judgment in favor of the FDIC on Counts II and III.

2. The $27,000 note

Ms. Wright proffered the March 10, 1983 letter to support her defense that the $27,000 note was satisfied from funds held in her escrow account. The district court credited that letter as evidence of payment in full of the $27,000 note. While the court evaluated the $25,000 and $75,200 notes in light of the *D'Oench* doctrine and section 1823(e), it failed to do the same with the $27,000 note. We do so now in the context of our independent review of the impact that the *D'Oench* doctrine and section 1823(e) have on this case.

Section 1823(e) is triggered because the agreement embodied in the letter would tend "to diminish or defeat the interest of the [FDIC] in any asset acquired by it . . . as receiver of any insured depository institution." 12 U.S.C.A. § 1823(e) (West 1989); *see also Public Loan Co., Inc. v. FDIC*, 803 F.2d 82, 84-85 (3d Cir. 1986) (section 1823(e) barred defense of accord and satisfaction); *FDIC v. Waldron*, 630 F.2d 239, 241 (4th Cir. 1980) (section 1823(e) barred defense of oral discharge of loan obligation). While the letter satisfies the writing requirement of section 1823(e)(1), it does not satisfy at least two of the other three requirements. The agreement was not ex-

ecuted "contemporaneously with the acquisition of the asset" by the bank. 12 U.S.C. § 1823(e)(2). Ms. Wright signed the note on November 12, 1982, and the letter was written almost four months later on March 10, 1983. Moreover, there is no evidence that the agreement was approved by the Bank's board of directors or loan committee as reflected in the minutes of either of those bodies. *See id.* § 1823(e)(3). There is some dispute whether the agreement was "continuously, from the time of its execution, an official record" of the Bank. *Id.* § 1823(e)(4). At oral argument, counsel for the FDIC stated that the FDIC found the letter among the Bank's records. After studying the issue carefully, we believe counsel's concession to be unquestionably contrary to the record in this case. Furthermore, the issue is not controlling. Failure to satisfy one of the requirements of section 1823(e) is fatal to any agreement covered by that section. "The short of the matter is that Congress opted for the certainty of the requirements set forth in § 1823(e). An agreement that meets them prevails . . . [and] an agreement that does not meet them fails. . . . Such a categorical recording scheme is of course not unusual." *Langley*, 484 U.S. at 95.

Ms. Wright's defense is similar to that offered in *FDIC v. P.L.M. Int'l, Inc.*, 834 F.2d 248 (1st Cir. 1987). There, the FDIC as receiver of a failed bank sought to hold the defendants liable as guarantors of a mortgage carried by the failed bank. The defendants proffered a written agreement executed by the failed bank releasing them from all obligation under the mortgage. *See id.* at 250. The court held that the written release satisfied only the first of section 1823(e)'s four requirements and therefore "the release has no validity against the FDIC and affords no protection in this action." *Id.* at 253. Like the defendants in *P.L.M.*, Ms. Wright argues that her obligation under the note was discharged pursuant to a written agreement executed by the Bank. However, that agreement, like the release agreement in *P.L.M.*, fails to satisfy the re-

quirements enumerated in section 1823(e). Thus, her defense based on that agreement must fail.[15]

Conclusion

The district court misapplied the *D'Oench* doctrine and 12 U.S.C. § 1823(e). A proper application of both would have precluded the defenses raised by Ms. Wright against the FDIC's actions on all three notes at issue here. Accordingly, we reverse the judgment of the district court.

REVERSED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[15] *See also FDIC v. Manatt*, 922 F.2d 486, 488-89 (8th Cir. 1991), *cert. denied*, 59 U.S.L.W. 3865 (U.S. 1991) (written agreement executed by bank purportedly releasing borrower-defendant of indebtedness failed to satisfy requirement that agreement be approved by and reflected in minutes of board of directors or loan committee); *FDIC v. Rivera-Arroyo*, 907 F.2d 1233, 1236 (1st Cir. 1990) (written release agreements failed to satisfy the requirements of section 1823(e)).

USCA 79004—Midwest Law Printing Co., Inc., Chicago—8-29-91—500

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ILLINOIS
EASTERN DIVISION

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver of Union National Bank of Chicago	)	
Plaintiff	)	
VS.	)	85C3252
	)	Judge
LILLIAN WRIGHT, et al	)	Duff
Defendants	)	

MEMORANDUM OPINION
FINDINGS OF FACT AND CONCLUSIONS OF LAW

This[1] came before this court for trial

---

[1]The original complaint consisted of seven counts. The plaintiffs voluntarily withdrew Count I prior to trial. Count VI stated a claim against Dorothy Montgomary, and a default judgment on that count was entered on September 24, 1986. This court entered summary judgement for the

without a jury on December 13th and 14th, 1989. The court has heard the evidence and has considered the testimony, exhibits, memoranda of law, and arguments of counsel. Now fully advised in this matter, the full trial having been concluded, the court finds these facts:

1. Union National Bank of Chicago ("Union National") was a national banking institution organized and existing under the laws of the United States. The Bank failed on July 8, 1983, and the Comptroller of the Currency appointed the Federal Deposit Insurance Corporation ("FDIC") receiver, pursuant to 28 U.S.C., § 1348 and

---

plaintiffs on Count VII on August 16, 1988. That count stated a claim against Ms. Wright, based upon her guarantee of the note to Ms. Montgomery. Thus, the only counts before this court at trial were counts II, III, IV and V.

12 U.S.C. §1819.

2. In its capacity as receiver, the FDIC reviewed the Bank's records in order to ascertain the Bank's assets and liabilities.

3. In some manner not disclosed be the evidence offered in this case, the FDIC discovered certain notes executed by Mrs. Lillian Wright in favor of the Bank, which appeared to be past due.

4. Some time thereafter, the FDIC brought this suit against Mrs. Wright, claiming that she is liable to it for the amounts due on those notes.

5. The FDIC submitted evidence about its 1989 procedures for taking an inventory of a bank's assets. Mr. Jesse Galindo, an FDIC Bank Liquidation Specialist, testified that the FDIC's normal procedure upon its appointment as receiver of a failed bank is to inventory the bank's assets, secure original notes and other collateral in FDIC vaults,

prepare asset cards identifying particular assets and setting forth the balance due, and verify those balances using the bank's records. Mr. Galindo, however, was not employed by the FDIC at the time it took over Union National, and was therefore unable to testify as to the FDIC's usual procedures at that time, not could he testify about the specific procedures during the inventory at Union National.

6. In fact, the FDIC offered no evidence at all about its practice in July, 1983, when it was appointed receiver of Union National Bank, and no evidence about its specific practices during the inventory at Union National.

7. Among the documents held by the FDIC, as Receiver of Union National, are the following (collectively, the "Wright Notes") :

(a) Commercial Promissory Note dated October 30, 1982 in the sum of $25,000.00,

marked "Unsecured".

(b) Commercial Promissory Note dated October 30, 1982 in the principal sum of $75,200.00, also marked "Unsecured".

(c) Commercial Promissory Note dated November 12, 1982 in the sum of $27,000.00.

(d) Promissory Note dated January 19, 1983 in the principal sum of $2,585.83.

8. At some point after it took over Union National, the FDIC prepared "asset cards" for various notes it found, including the Wright notes. Each asset card assigns an "asset number" to the note it describes.

9. Lillian Wright signed the Wright Notes and delivered them to Union National Bank of Chicago.

10. Although the Wright Notes are facially unqualified (albeit unsecured) unconditional promises to pay Union National, there is no evidence that either the $75,200 note or the $25,000 note were ever approved by

the loan committee or the Board of Directors as loans. No money was ever paid to Ms. Wright or credited to her account on the basis of those notes.

11. Ms. Wright did receive a letter from the Bank on April 5, 1983, stating that "your note in the amount of $25,000 is now past due. Because of inadequate current financial information and your past due status, we now deem your debt of $133,60, plus interest and ask you pay the entire debt within ten (10) days of this letter" However, that letter does not in any way identify the $25,000 note, nor the source of the remaining $108,600 'debt`. Accordingly, this court finds that the letter has minimal probative value.

12. Ms. Wright received a letter dated March 10, 1983 from the then-president of Union National, Ona Lee Kelley.[2] The letter

---

[2]Neither Ms. Wright not the FDIC were able to produce Ms. Kelley either to give her

(somewhat ambiguously) states that the Bank was canceling the $75,200 and $25,000 note. The letter further stated that the Bank would satisfy the $27,000 note with funds from Ms. Wright's Escrow account, in which her accounts receivable were deposited. This letter identifies the account numbers for each of the loans. This court finds that the letter is credible, and that it effectively canceled the referenced notes.

13. Neither Ms. Wright, not anyone acting on her behalf, made any payments to the Bank, or later to the FDIC in satisfaction of the principal amounts due on the Wright Notes, except that there is some evidence (handwritten notations on the back of the note) that Ms. Wright made interest payments on the $25,000 note prior to May 24, 1983.

14. The $75,200.00 Note was a consolidation and renewal of prior notes

---

deposition or to testify at trial.

signed and delivered to Union National by Ms. Wright.

15. The prior notes renewed by the $75,200.00 Note were canceled and returned to Ms. Wright.

16. Ms. Wright was a Director of Union National from 1981 until 1983.

16. She was also a businesswoman doing business as Community Beauty and Barber Supply and had at one time sought, as a member of a group of investors, to purchase the Bank.

18. Ms. Wright has not paid or otherwise satisfied the Wright Notes.

19. The FDIC has submitted checking account statements (plaintiff's exhibit 13) to support the proposition that Ms. Wright never had sufficient funds to set off the balance due Union National under the $27,000.00 Note. The letter, however, expressly states that the balance was to be set off with funds held in an escrow account, not with checking account

funds. Since the FDIC has not accounted for such an escrow account, and the account summary submitted only documents checking account activity, the FDIC has not proven that the note could not have been satisfied with the escrow funds.

20. Although Ms.Wright claimed that Union National did not keep computer records, the checking account statements for her company, which she identified, are computerized records.

CONCLUSIONS OF LAW

The FDIC argues that these facts compel this court to enter judgment against Ms. Wright. Citing D'Oench, Duhme Co., Inc. v. FDIC, 315 U.S.447 (1942), and the doctrine which has evolved from it, the FDIC maintains that Ms. Wright is obligated to the FDIC, notwithstanding any agreement she and Union National may have had to treat the notes as non-binding.

D'OENCH DUHME DOCTRINE

In D'Oench, the defendant executed a facially unqualified note in favor of his bank. The bank never made a loan or gave any other consideration for the note; the defendant knew that the bank was using the note solely to give the appearance that its assets were greater than they actually were. The defendant and the bank had an "understanding" that the bank would not collect on the note. The bank, however, soon became unable to conceal its troubled condition and eventually the FDIC took it over.

The FDIC attempted to collect on the note, and the defendant offered his agreement with the bank as a defense. The Supreme Court recognized a federal policy to protect the FDIC, as well as the public funds it administers,from misrepresentations about the assets of banks insured by the FDIC. Thus, it

held that since the "maker lent himself to a scheme or arrangement whereby the banking authority ... was likely to be misled," he could not use that scheme or arrangement as a defense against the FDIC> 315 U.S. at 460. "Public policy requires that a person who, for the accommodation of the bank, executes an instrument which is in form a binding obligation should be estopped from thereafter asserting that simultaneously the parties agreed that the instrument should not be enforced." Id. at 459. To allow parties to avoid such instruments, the court concluded, would be to thwart the FDIC's goal of quickly ascertaining the status of a bank for which it becomes the receiver, and that is a critical function of the FDIC.

Since D'Oench was decided, Congress enacted 12 U.S.C.§1823, which partially codifies the D'Oench doctrine. Specifically, §1823(e) provides:

No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement

(1) shall be in writing,

(2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank,

(3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(4) shall have been, continuously, from the time of its execution, an official record of the bank.

Section 1823(e) codifies the D'Oench doctrine insofar as it applies to the FDIC

acting as a receiver, This court must therefore decide whether § 1823(e) preempts the common law which has arisen from D'Oench insofar as it applies to the FDIC as receiver. Neither the Supreme Court not the Seventh Circuit has directly addressed the question;, in fact, only a handfull of courts have considered it.

Preemption of D'Oench by §1823(e)

Judge Higginbotham, of the Fifth Circuit, concluded that D'Oench is not preempted by §1823(e) in cases where the FDIC is acting as receiver. FDIC v. McLanahan, 795 F.2d 512 (5th Cir. 1986), involved a farmer who signed a blank promissory note and turned it over to a bank director in connection with his application for a loan. Although the director told the farmer that the loan had been denied, in fact the director completed the note to reflect a $62,500 loan, and took the money for himself. Id at 514. The

bank later failed and the FDIC, acting as receiver, sued the farmer for the amount due on the note.

The court raised the preemption question, and decided that §1823(e) could not be construed as preempting D'Oench. In support of its holding, the court pointed out that §1823(e) specifically applies to the FDIC only when it is acting in its corporate, rather than receiver capacity, that there is no mention of D'Oench if the legislative history and there was therefore "no reason to suppose that Congress intended to forbid the rule of estoppel from being applied when the FDIC sues as receiver of a failed bank." Id., n.1. This court;s research has revealed only one other case in which the question of preemption was directly confronted. A Northern District of New York court decided that the D'Oench doctrine, insofar as it applies to the FDIC acting as receiver, is not preempted by

§1823(e). Yankee Bank for Finance & Savings, FSB v. Task Associates, Inc., No. 88-CV-224, slip op. (N.D.N.Y., Aug.4, 1989), 1989 U.S. Dist, Lexis 9159 (Section 1823(e) is not comprehensive and there is no evidence that Congress intended it to preempt the common law doctrine). This court agrees with the two other courts which have decided this question, and holds that the common law doctrine arising from D'Oench is not preempted by §1823(e).[3]

---

[3] In its April 25, 1989 opinion in this case, this court observed that the Seventh Circuit might be moving away for the D'Oench doctrine, and relying solely upon §1823(e). The case cited by this court which led to that inference, FDIC v. O'Neil, 809 F.2d 350 (7th Cir. 1987), involved the FDIC in its corporate capacity (and therefore

The FDIC's Case

Since this court concludes that the D'Oench doctrine is still applicable where the FDIC acts as a receiver, it must now consider the arguments of the parties on the merits. The FDIC's argument is powerful. The D'Oench doctrine applies to cases in which the

---

expressly within the language of §1923(e)). Recently, the Seventh Circuit has issued an opinion which, while not relying expressly upon the D'Oench doctrine, discusses it in conjunction with §1823(e), treating it as viable, at least when applied to the FDIC acting as receiver. FDIC v. State Bank of Virden, No. 89-1334, slip op. (7th Cir. Jan. 11, 1990).

In its April 25, 1989 opinion in this case, this court observed

FDIC acts as receiver, and makes the FDIC nearly invincible when it attempts to collect on a facially valid asset. Nearly invincible, however, is not invincible.

Even under D'Oench, the FDIC is obligated to prove that it acquired the notes from the bank's open files; that is, that at the time the FDIC took over, the bank carried the note as an asset. This the FDIC has not done. It offered no testimony or evidence from anyone who was part of the group which inventoried Union National's assets after it went into receivership. Mr. Galindo's testimony was fine as far as it went, but it did not, could not, prove anything about the FDIC's practices in 1983, when Union National was closed.

The parties do not dispute that Union National's records were in disarray when the Bank closed. In fact, that is, in part, why it was closed. Thus, if the FDIC cannot

show this court that it made some effort to distinguish between closed and open files when it took its inventory of Union National's assets, this court cannot allow it to take advantage of the D'Oench doctrine. This court will not grant the FDIC the significant power of the D'Oench doctrine, that is, to collect on any signed note, whether or not it was in fact supported by consideration and whether or not it was in fact a valid asset of the bank, unless the FDIC can demonstrate to the court that it shouldered its responsibility to make some effort to ascertain whether the notes were valid. This the FDIC has not done, and therefore it is not entitled to the substantial advantage conferred by the D'Oench doctrine.

It remains, then, for this court to decide whether the FDIC has proven by a preponderance of the evidence, that any of the notes upon which it has sued Ms. Wright, are

valid. The court will address each note in turn.

The $25,000 "unsecured" note, alleged in Count II of the FDIC's complaint was never approved by the Bank's Board of Director's, and is unsupported by any consideration. The $75,200 note alleged in Count III was also marked "Unsecured", and was also unsupported by consideration. This court has already found (Finding of Fact 12) that Both notes were canceled in March, 1983, pursuant to the letter from Ona Lee Kelley.[4] Since the

---

[4] Ms. Wright also introduced copies of both notes which were stamped "Canceled". The FDIC maintained that the "canceled" notes were not authentic. Neither parties will win any merit badges for their presentation of evidence on this issue. Fortunately, because this court finds the letter alone

notes were not valid when the FDIC acquired them, the FDIC cannot now sue to collect them.

The March, 1983 letter stated that the $27,000 note alleged in Count 4, was not canceled, but was to be paid off with money from Ms. Wright's accounts receivable fund, held in an escrow account at the bank. The FDIC claims that there was never sufficient money in Ms. Wright's escrow account to satisfy the balance due on the $27,000 note. The FDIC, however, offered only checking account statements to support its argument that there was not enough money in the escrow account. The FDIC offered no evidence that, had an escrow account existed, it would have been reflected on the checking account

---

sufficient to support its conclusion that the notes were canceled, it need not decide whether the "canceled" notes were authentic.

presented a facially valid, executed note, and Ms. Wright has asserted no defenses to it, this court will enter judgment for the FDIC on that note.

Conclusion

Judgment is entered for Ms. Wright on Counts 2,3, and 4. Judgment is entered for the FDIC on Count 5, in the amount of $2,450.43.

ENTER:

BRIAN BARNETT DUFF,JUDGE

UNITED STATES DISTRICT COURT

DATE: April 30, 1990

FILED
APR 6 1992
OFFICE OF THE CLERK

(2)

No. 91-1274

In the Supreme Court of the United States

OCTOBER TERM, 1991

LILLIAN WRIGHT, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

ALFRED J.T. BYRNE
General Counsel
DOROTHY L. NICHOLS
Associate General Counsel
ANN S. DUROSS
Assistant General Counsel
COLLEEN B. BOMBARDIER
Senior Counsel
JACLYN C. TANER
Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

QUESTION PRESENTED

Whether the court of appeals correctly applied the rule of *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and 12 U.S.C. 1823(e) to allow the FDIC to enforce promissory notes acquired as receiver of a failed bank, despite petitioner's affirmative defenses based on an unrecorded side agreement.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Campbell Leasing, Inc. v. *FDIC*, 901 F.2d 1244 (5th Cir. 1990)	8
Chatham Ventures, Inc. v. *FDIC*, 651 F.2d 355 (5th Cir. 1981), cert. denied, 456 U.S. 972 (1982)	8
Commerce Federal Savings Bank v. *FDIC*, 872 F.2d 1240 (6th Cir. 1989)	6
D'Oench, Duhme & Co. v. *FDIC*, 315 U.S. 447 (1942)	3
FDIC v. *Bracero & Rivera, Inc.*, 895 F.2d 824 (1st Cir. 1990)	5
FDIC v. *Caporale*, 931 F.2d 1 (1st Cir. 1991)	7
FDIC v. *Manatt*, 922 F.2d 486 (8th Cir.), cert. denied, 111 S. Ct. 2889 (1991)	7
FDIC v. *McClanahan*, 795 F.2d 512 (5th Cir. 1986)	7
FDIC v. *McCullough*, 911 F.2d 593 (11th Cir. 1990), cert. denied, 111 S. Ct. 2235 (1991)	7
FDIC v. *Merchants National Bank*, 725 F.2d 634 (11th Cir.), cert. denied, 469 U.S. 829 (1984)	6
FDIC v. *Rivera-Arroyo*, 907 F.2d 1233 (1st Cir. 1990)	7
FDIC v. *State Bank*, 893 F.2d 139 (7th Cir. 1990)	8
FDIC v. *Venture Contractors, Inc.*, 825 F.2d 143 (7th Cir. 1987)	4
Goodman v. *Lukens Steel Co.*, 482 U.S. 656 (1987)	7
Grubb v. *FDIC*, 868 F.2d 1151 (10th Cir. 1989)	6
Langley v. *FDIC*, 484 U.S. 86 (1987)	7

Cases—Continued: Page

Logan v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982)..... 8
Savers Fed. Sav. & Loan Ass'n v. *Amberley Huntsville, Ltd.*, 934 F.2d 1201 (11th Cir. 1991)..... 7-8
Timberland Design, Inc. v. *First Serv. Bank for Sav.*, 932 F.2d 46 (1st Cir. 1991)..... 8
Twin Constr., Inc. v. *Boca Raton, Inc.*, 925 F.2d 378 (11th Cir. 1991)..... 8

Constitution and statutes:

U.S. Const. Amend. V (Due Process Clause)..... 8
Act of Sept. 21, 1950, ch. 967, § 2, 64 Stat. 889..... 4
Financial Institution Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 217(4), 103 Stat. 256 (12 U.S.C. 1823(e) (Supp. I 1989))..... 4
12 U.S.C. 1823(e)..... 4, 5, 6, 7, 8

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1274

LILLIAN WRIGHT, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A24, is reported at 942 F.2d 1089. The opinion of the district court, Pet. App. B1-B21, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1991. The petition for a writ of certiorari was filed on November 27, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On October 30, 1982, petitioner—then a director of Union National Bank, a federally insured national bank—executed two unconditional promissory notes payable to the bank for $75,200 and $25,000, respectively. Pet. App. B4-B5. The $75,200 note consolidated and renewed several prior notes that petitioner had previously signed and delivered to the bank. *Id.* at B7-B8. On November 12, 1982, petitioner executed a third unconditional promissory note for $27,000 payable to the bank. *Id.* at B5.

On July 8, 1983, the Comptroller of the Currency declared the bank insolvent and appointed the FDIC as receiver. Pet. App. B2. Petitioner's promissory notes were among the assets of the Bank acquired by the FDIC in its receivership capacity. The bank's records showed that petitioner had made no payments of the principal amounts owing on any of the notes. *Id.* at B7.

2. The FDIC sued petitioner in federal district court seeking to collect on the notes.[1] Petitioner admitted signing and delivering the notes to the bank, and stipulated that the notes were assets of the bank at the time the FDIC took over as receiver. Pet. App. A4. She asserted, however, that she had executed the $75,200 and $25,000 notes as part of an application for a line of credit, and that the bank had agreed not to enforce the notes unless it granted the loan application, which it never did. According to petitioner, no funds were ever advanced on the notes and thus they were invalid for lack of consideration. *Id.* at A5. Petitioner further claimed that she had repaid the $27,000 note. *Ibid.*

---

[1] The FDIC also sued petitioner on two additional notes. Pet. App. B1-B2. Petitioner did not appeal from the judgments obtained by the FDIC on those notes.

The FDIC filed a motion in limine seeking to exclude any evidence in support of petitioner's defense of lack of consideration, relying on the common law estoppel rule established in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), which forbids proof of secret side agreements that would defeat the FDIC's efforts to collect facially valid bank assets. The district court denied the motion, ruling that the *D'Oench* doctrine was inapplicable because the FDIC had failed to establish that petitioner's execution of the notes was part of a scheme or arrangement likely to mislead banking authorities. Pet. App. A4.

At trial, petitioner introduced a letter dated March 10, 1983, from the bank's president to petitioner. According to petitioner, the letter released her from any obligations on the $25,000 and $75,200 notes and indicated that the $27,000 note would be repaid from an escrow account. Pet. App. A5-A6.

The district court found for petitioner on all three notes. Pet. App. B1-B21. Even though the notes were "facially unqualified (albeit unsecured) unconditional promises to pay," *id.* at B5, the court concluded that the *D'Oench* doctrine was inapplicable because the FDIC had failed to demonstrate that the bank had carried the notes as assets at the time of the FDIC's takeover in July 1983. *Id.* at B17-B18. The court then found that the March 10, 1983, letter had cancelled the $75,200 and $25,000 notes. *Id.* at B7, B19-B20. The court also relied on the letter to conclude that the $27,000 note had been satisfied from an escrow account. *Id.* at B20.

3. The court of appeals reversed. Pet. App. A1-A24. The court held that the district court had "misapprehended the requirement of proving a scheme or agreement likely to mislead banking authorities" under the *D'Oench* doctrine, Pet. App. A17, and that *D'Oench* applies even in the absence of any intent to defraud. Pet.

App. A18. Thus, the court concluded that *D'Oench* and its statutory counterpart, 12 U.S.C. 1823(e),[2] barred petitioner's claim that the bank had agreed not to enforce the facially unconditional $25,000 and $75,200 notes. Pet. App. A19-A20.

The court of appeals also held that the district court erred in requiring the FDIC to prove that the $25,000 and $75,200 notes had been obtained from the bank's open files. Relying on testimony to the effect that the FDIC does not generally seek to enforce instruments found in a failed bank's closed files, and pointing to petitioner's stipulation that the notes were assets of the failed bank, the court held that the FDIC had met its burden of establishing an inference that the notes were valid assets of the bank. Pet. App. A20-A22, citing *FDIC* v. *Venture Contractors, Inc.*, 825 F.2d 143 (7th Cir. 1987).

The court of appeals next concluded that 12 U.S.C. 1823(e) barred petitioner's claim that, as set forth in the March 10 letter, the bank had agreed to accept funds from an escrow account in satisfaction of the $27,000

---

[2] Section 1823(e) bars the assertion of an agreement against the FDIC to defeat or diminish the FDIC's interest in an asset unless the agreement meets each of four requirements: (1) it must be in writing; (2) it must have been executed by both the bank and the obligor contemporaneously with the acquisition of the asset by the failed bank; (3) it must have been approved by the bank's board of directors or loan committee and the approval must be reflected in the minutes of the board or committee; and (4) it must have been continuously maintained as an official bank record. Section 1823(e) was enacted in 1950 as a statutory counterpart of the *D'Oench* doctrine. See Act of Sept. 21, 1950, ch. 967, § 2, 64 Stat. 889. The original version of the statute applied only to the FDIC in its corporate capacity, but the statute was amended by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, § 217(4), 103 Stat. 256 (12 U.S.C. 1823(e) (Supp. I 1989)), to apply to the FDIC in its capacity as receiver as well. The court of appeals held that the 1989 amendment was applicable to petitioner's claims. Pet. App. A11-A16.

note. The court found that the agreement embodied in the March 10 letter was subject to Section 1823(e) because it tended to "diminish or defeat the" FDIC's interest in the note within the meaning of the statute. Since the letter failed three of the requirements of Section 1823(e)—it was not executed contemporaneously with the bank's acquisition of the note, it was not approved by the bank's board of directors or loan committee, and it had not been an official record of the bank continuously from the date of its execution—the letter could not be used to support petitioner's defense of accord and satisfaction. Pet. App. A22-A24.

ARGUMENT

The court of appeals' holding that petitioner's affirmative defenses are barred by the *D'Oench* doctrine and by Section 1823(e) is a correct application of settled law. The court's decision does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. Petitioner first argues (Pet. 15-19) that the court of appeals' decision conflicts with decisions of other courts of appeals finding *D'Oench* and Section 1823(e) inapplicable where a note has been invalidated by acts independent of an unrecorded side agreement. The cases on which she relies, however, are inapposite. In *FDIC* v. *Bracero & Rivera, Inc.*, 895 F.2d 824 (1st Cir. 1990), the FDIC sought to enforce a mortgage note that had been paid and canceled before the FDIC took over as receiver; the district court expressly found that the bank records showing the note's cancellation and repayment "were in the hands of FDIC *at all relevant times*." *Id.* at 829 (emphasis by court of appeals). Thus, the court held that any "secret agreement" between the defendants and the bank was beside the point because the repayment and cancellation of the note "were independent of the alleged secret agreement." *Id.* at 830.

Similarly, in *Commerce Federal Savings Bank* v. *FDIC*, 872 F.2d 1240 (6th Cir. 1989), the FDIC sought to enforce a mortgage even though the bank's records clearly showed that the underlying debt had been repaid prior to the bank's failure, thus extinguishing the mortgage by operation of law. 872 F.2d at 1242 & n.3, 1244-1246. The mortgage contained a "dragnet clause" securing any subsequently incurred debts that came into existence prior to the satisfaction of the original debt, but the FDIC was unable to prove that any such debts existed. Thus, the Sixth Circuit held that the repayment of the original debt—an act independent of any side agreement and clearly reflected in the bank's records—extinguished the mortgage for purposes of Section 1823(e).[3]

In this case, by contrast, the bank's alleged promise not to enforce the $25,000 and $75,200 notes was itself a secret side agreement, and thus could not constitute a

---

[3] *Grubb* v. *FDIC*, 868 F.2d 1151 (10th Cir. 1989), is of no assistance to petitioner. See Pet. 17. In *Grubb*, the district court had entered judgment denying the bank recovery on certain notes before the FDIC acquired the bank's assets. Noting that the district court's "judgment provided the FDIC a reliable record indicating that the notes were void," 868 F.2d at 1159, the court held that the FDIC had acquired no interest in the notes, and that Section 1823(e) and *D'Oench* were therefore inapplicable. *Grubb* is clearly distinguishable, because in this case the FDIC had no "reliable record" of the alleged side agreement canceling the notes.

Finally, petitioner's reliance (Pet. 16) on *dicta* in *FDIC* v. *Merchants National Bank*, 725 F.2d 634 (11th Cir.), cert. denied, 469 U.S. 829 (1984), is of no avail. That case holds that, in general, the only evidence that may be admitted to defeat a claim by the FDIC to collect a failed bank's asset is evidence meeting the strict requirements of Section 1823(e). See 725 F.2d at 639. This case does not fall within the "narrow exceptions" to Section 1823(e) noted in *Merchants National*, because petitioner's defenses are not based on "acts independent of any understanding or side agreement." *Ibid.*

valid defense against the FDIC. There is simply no factual basis for petitioner's claim (Pet. 16) that the alleged cancellation of her promissory notes was an act independent of that undisclosed side agreement. Neither the notes she executed, nor the bank's official records, revealed any conditions on repayment of the notes.[4] The court of appeals' decision is fully consistent with this Court's decisions in *D'Oench* and *Langley* v. *FDIC*, 484 U.S. 86 (1987), as well as decisions of other courts of appeals that have consistently applied *D'Oench* and Section 1823(e) to protect the FDIC from a defense of lack of consideration. See, *e.g.*, *FDIC* v. *Caporale*, 931 F.2d 1, 2 (1st Cir. 1991); *FDIC* v. *McCullough*, 911 F.2d 593, 601 (11th Cir. 1990), cert. denied, 111 S. Ct. 2235 (1991); *FDIC* v. *McClanahan*, 795 F.2d 512, 515-516 (5th Cir. 1986).

Similarly lacking in merit is petitioner's assertion (Pet. 18) that Section 1823(e) does not apply to her defense that the March 10 letter shows satisfaction of the $27,000 note. The court of appeals' decision on that issue is fully consistent with the decisions of other circuits applying Section 1823(e) to exclude accord and satisfaction defenses based on written side agreements. See, *e.g.*, *FDIC* v. *Manatt*, 922 F.2d 486, 488-489 (8th Cir.), cert. denied, 111 S. Ct. 2889 (1991); *FDIC* v. *Rivera-Arroyo*, 907 F.2d 1233, 1236 (1st Cir. 1990). Moreover, the *D'Oench* doctrine compels the same result, because the March 10 letter constituted an unrecorded side agreement that was likely to mislead banking authorities. See, *e.g.*, *Savers Fed. Sav. & Loan Ass'n* v. *Amberley*

---

[4] Petitioner asserts (Pet. 22) that the notes were in fact facially qualified and conditional. The district court's findings to the contrary, Pet. App. B5, were not disturbed on appeal, however, and should be deemed conclusive. See *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987). Likewise, the court of appeals' fact-bound determination that the March 10 letter was not found in the bank's records, Pet. App. A23, is not worthy of review.

Huntsville, Ltd., 934 F.2d 1201, 1206-1207 (11th Cir. 1991) (*D'Oench* bars reliance on any written or unwritten side agreement that does not appear in the bank's records).[5]

2. Petitioner also contends (Pet. 19-27) that the application of *D'Oench* and Section 1823(e) to foreclose her defenses to the notes constitutes a violation of due process. There is no merit to that claim.

As this Court has observed, under the Due Process Clause government "remains free to create substantive defenses or immunities for use in adjudication." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). The Clause generally forbids government to deprive persons of property interests without providing them an opportunity to be heard, *id.* at 433, but petitioner had ample opportunity to contest the applicability of *D'Oench* and Section 1823(e) to the facts of her case. Due process requires no more.[6]

---

[5] Petitioner suggests in passing (Pet. 24 n.5) that the court of appeals erred in applying the amended version of Section 1823(e) to this case. That issue is irrelevant, however, because the *D'Oench* doctrine would compel the same result even if Section 1823(e) were inapplicable. *D'Oench* has consistently been applied in cases where the FDIC acted as receiver, see *Timberland Design, Inc.* v. *First Serv. Bank for Sav.*, 932 F.2d 46, 49 (1st Cir. 1991) (citing cases), and thus the 1989 extension of Section 1823(e) to the FDIC in its receivership capacity merely restated existing law, see *Twin Constr., Inc.* v. *Boca Raton, Inc.*, 925 F.2d 378, 382 & n.2 (11th Cir. 1991); *FDIC* v. *State Bank*, 893 F.2d 139, 143 (7th Cir. 1990).

[6] The courts of appeals have uniformly rejected similar due process challenges. See, *e.g.*, *Campbell Leasing, Inc.* v. *FDIC*, 901 F.2d 1244, 1248 (5th Cir. 1990); *FDIC* v. *State Bank*, 893 F.2d 139, 144 (7th Cir. 1990); *Chatham Ventures, Inc.* v. *FDIC*, 651 F.2d 355, 362-363 (5th Cir. 1981), cert. denied, 456 U.S. 972 (1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ALFRED J.T. BYRNE
General Counsel
DOROTHY L. NICHOLS
Associate General Counsel
ANN S. DUROSS
Assistant General Counsel
COLLEEN B. BOMBARDIER
Senior Counsel
JACLYN C. TANER
Counsel
Federal Deposit Insurance Corporation

APRIL 1992